IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.5244 OF 2005

Pradeep Indalkar ...Applicant
vs.
1.State of Maharashtra
2.Dilip Tukaram Kand
3.Smt.Kashimira Dilip Kand ...Respondents

Mr.J.S.Kini for the Applicant
Ms M.H.Mhatre,A.P.P. for State
Mr.Prakash Naik for Respondent No.3

CORAM: A.S.OKA,J.
DATE : SEPTEMBER 6,2005

ORAL JUDGMENT:

1. The prayer in this Application is for transfer of Criminal Case No.127 of 2002 pending in the Court of learned Judicial Magistrate (F.C.) Thane to the Court of the learned Metropolitan Magistrate, 48th Court, Andheri which is hearing the Criminal Case No.506/P/2002.

2. The case pending in the Court of learned Judicial Magistrate (F.C.), Thane is a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as the said Act of 1881) filed by the Respondent No.3 in her capacity as a Director of M/s.Anushree Holidays Pvt.Ltd., Thane. The Respondent No.2 herein filed F.I.R. on 5th January 2002 against the Petitioner in Vile Parle Police Station at Mumbai alleging commission of offence under Section 409 and 420 of the Indian Penal Code against the Applicant.

3. The learned Counsel for the Applicant submitted that the subject matter of the private complaint filed by the Respondent No.3 and the subject matter of F.I.R. registered against the Applicant at the instance of the Respondent No.2 is the same. He pointed out relevant averments made in the private complaint. He has also placed on record a copy of F.I.R. lodged by the Respondent No.2. He submitted that on the basis of the said F.I.R. lodged by the Respondent No.2, the Applicant is being prosecuted in the Court of the Metropolitan Magistrate, 48th Court, Andheri, Bombay. He submitted that both the cases are based on the same transaction. He submitted that if the complaint which is pending in the Court at Thane is heard independently prior to the case pending in the Court of Metropolitan Magistrate in Mumbai, the Applicant will have to disclose his defence and the same will cause prejudice to the Applicant. He placed reliance on the decision of the Apex Court reported in 2001 Cr.L.J. (S.C.) page 1072 (Sudhir and others Vs. State of Madhya Pradesh). He pressed into service a decision of the learned Single Judge of this Court reported in 2001 Bom.C.R. (Supplementary 2) page 127 (CBI, ACB Vs. Union Bank of India). He also invited my attention to another decision of the learned Single Judge of this Court reported in 1984 Bom.C.R. (1) page 157 (Anthony Dsouza Vs. Radhabai Brij Ratan Mohatta). He submitted that when both the cases relate

to the same transaction, the same should be tried before the same Court. He submitted that if the cases are tried before different courts, the witnesses will have to appear and depose before both the courts for the offence arising out of same transaction.

4. The learned Counsel for the Respondent Nos.2 and 3 submitted that even assuming that the offences relate to the same transaction, these are different offences punishable under separate enactments. He submitted that Affidavit of examination-in-chief has already been filed by the Respondent No.3 in the complaint which is pending in the Court at Thane and this application is an effort to delay the disposal of the case under Section 138 of the said Act of 1881. Relying upon the decision of the Supreme Court reported in (2001) 6 S.C.C. page 463 in case of Dalmia Cement (Bharat) Ltd. Vs. Galaxy Traders & Agencies Ltd. & Others, the learned Counsel for the Respondent Nos.2 and 3 submitted that the scope of enquiry in both the cases is completely different and therefore if the order of transfer is passed, it will only result in delaying the proceedings under Section 138 of the said Act of 1881.

5. I have considered the submissions. On plain reading of the F.I.R. filed by the Respondent No.2 and the private complaint filed at the instance of the Respondent No.3, it appears that the alleged offences relate to the same

transaction. A reference will have to be made to the decision of the learned Single Judge of this Court in case of CBI ACB Vs. Union Bank of India reported in 2001 Bom.CR (Supp.2) page 127.In the said case the Respondent No.2 to 5 were charged with offences punishable under provisions Indian Penal Code as well as under the Prevention of Corruption Act, 1988. The Respondent No.1 before this Court filed private complaint in the court of Judicial Magistrate (F.C.) against the Respondent Nos.3 and 4 for various offences punishable under I.P.C. A Police case was filed against the said accused on the basis of the said transaction alleging commission of same offences under I.P.C. The case filed on the basis of police report was before the learned Special Judge at Goa. The learned Single Judge in paragraph No.7 of the said decision held thus :

"7. Having regard to the admitted position that both the cases relate to the same transaction, it is wholly incomprehensible as to why the same should be tried before two separate courts and thus invite a situation of inconsistent orders being passed. However, it will be in the interest of general convenience of the parties as well as the witness, who are undoubtedly common in both the cases that they are tried before one Court. On the other hand, the parties as well as witnesses will have to appear before two different courts, though the offences

> arise out of the same transaction. It will be wholly unjust and inexpedient that the witnesses are made to depose twice before separate courts for the matter relating to the same transaction. This would result in avoidable delay and more than that multiplicity of proceedings with the possibility of inconsistent orders being passed by the two courts for the common offences arising out of the same transaction. To obviate such a situation, it would be expedient in the interest of justice and in the interest of all concerned that both the cases are tried before the Special Judge, Goa."

This Court directed that the criminal case should be transferred to the Special Court which should be tried by the Special Judge who was empowered to exercise the powers of the Sessions Court. It was directed that the cases will be tried separately and not together. In another decision of the Single Judge in case of Anthony Dsouza (supra), the learned Single Judge considered the provisions of Section 210 of the Code of Criminal Procedure, 1973. Referring to the said provision the learned Single Judge held thus:

. "The effect of this section is that the private complaint and the subsequent proceedings initiated by the Police are to be tried together by the

Magistrate in view of provisions of Section 210, as if both the cases are instituted on police report. This section intended to stop overlapping of the cases i.e., the complaint case and the police case. Under the old Code, sometimes difficulty arose in regard to the situation created by initiation of the proceedings by the private complaint and the subsequent investigation by the police in the matter of common incident and common accused. There was uncertainty in regard to the provisions to be followed and controversy had arisen in order to remove this uncertainty, the legislature has introduced this section. Except as stated in sub-section (3) proceedings on private complaint and on police report are to be relied together. The Section also provides for merger of the two cases i.e. complaint case and the police case."

6. Reliance is also placed by the learned Counsel for the Applicant on the decision of the Apex Court in case of Sudhir and others (supra). In paragraph No.8 the Apex Court held thus :

"8. It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same Court by pronouncing

> judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High courts and "cross cases" by some other High courts..."

7. In the present case, the complaint filed by the Respondent No.3 is for offence punishable under Section 138 of the said Act of 1881 and the case which is proceeding on police Report is for a distinct offence under the I.P.C. The Apex Court in a decision reported in (1988) 4 S.C.C. page 655 (State of Bihar Vs. Murad Ali Khan and others) held that the same set of facts, in conceivable cases, can constitute offences under two different laws. An act or omission can amount to constitute an offence under the I.P.C. and at the same time constitute an offence in any other law. In the present case also the act or omission on the part of the Applicant constitutes offences under two distinct enactments.

8. For considering the prayer made by the Applicant, it will be necessary to see what is the nature of the offence under Section 138 of the said Act of 1881. The Apex Court in the decision in case of of Dalmia Cement (supra) has already held that by legal fiction section 138 makes a civil transaction to be an offence. Perusal of the relevant provisions of the said Act of 1881 and in particular Sections 138 to 142 it appears

that the offence under the said Act is in a sense a technical offence where the presence of mense rea may not be necessary. Section 139 of the said Act is very peculiar provision which raises a presumption that unless contrary is proved, the holder of a cheque received the cheque of the nature referred to in Section 138 for the discharge of any debt or liability. In the case of Dalmia Cement the Apex Court observed thus :

"3. The Act was enacted and Section 138 thereof incorporated with a specified object of making a special provision by incorporating a strict liability so far as the cheque, a negotiable instrument, is concerned. The law relating to negotiable instruments is the law of commercial world legislated to facilitate the activities in trade and commerce making provision of giving sanctity to the instruments of credit which could be deemed to be convertible into money and easily passable from one person to another. In the absence of such instruments, including a cheque, the trade and commerce activities, in the present day world, are likely to be adversely affected as it is impracticable for the trading community to carry on with it the bulk of the currency in force. The negotiable instruments are in fact the instruments of credit being convertible on account of legality

> of being negotiated and are easily passable from one hand to another. To achieve the objectives of the Act, the legislature has, in its wisdom, thought it proper to make such provisions in the Act for conferring such privileges to the mercantile instruments contemplated under it and provide special penalties and procedure in case the obligations under the instruments are not discharged. **The laws relating to the Act are, therefore, required to be interpreted in the light of the objects intended to be achieved by it despite there were deviations from the general law and the procedure provided for the redressal of the grievances to the litigants. Efforts to defeat the objectives of law by resorting to innovative measures and methods are to be discouraged, lest it may affect the commercial and mercantile activities in a smooth and healthy manner, ultimately affecting the economy of the country."** (Emphasis supplied)

At this stage it will also be necessary to note that a Division Bench of this Court after considering the provisions of the said Act of 1881 has directed expeditious disposal of all the complaints under Section 138 of the said Act of 1881. The defence available in a case under section 138 is also limited in nature in view of presumption created by Section

139 of the statute. Considering the nature of offence under Section 138 of the said Act of 1881 and nature of offences under Sections 409, 420 of the Indian Penal Code, it is not possible to accept the contentions of the Applicant that the Applicant will have to disclose his defence in the prosecution under I.P.C. while defending the private complaint under Section 138 of the said Act of 1881. Considering the scope of offence if the said case under I.P.C. in Mumbai is ordered to be heard along with complaint under Section 138 of the said Act of 1881, the result will be delay in disposal of the complaint which will be contrary to the express intention of the legislature. In fact Section 143 to 147 have been brought on the statute-book by the Amending Act of 2002 with the express object of early disposal of cases under Section 138. In a complaint under Section 138, examination in chief of the witnesses will be by way of Affidavits. The procedure for trial will be of summary trial. The case under Section 409 and 420 of I.P.C. will be warrant triable.

9. The Applicant cannot press into service the decision of Single Judge in case of CBI ACB (supra). In the case before the learned Single Judge, both the cases included the same offence under I.P.C. In the context of the factual situation arising before him the learned Single Judge has passed the order. The Apex Court decision in case of Sudhir (supra) also does not help the Applicant as fact situation therein was

completely different.

10. There is no case made out for transfer. Hence, Application is rejected.

12. It is made clear that all contentions of the parties on merits in both the cases are expressly kept open.

13. At this stage, the learned Counsel for the Applicant prays that for a period of four weeks the case pending in the Court of Judicial Magistrate (F.C.) at Thane should not be allowed to be proceeded with. The said prayer is opposed by the learned counsel for the Respondent Nos.2 and 3. Considering the facts and circumstances of the case the trial pending in the Court of Judicial Magistrate (F.C.), Thane will remain stayed for a period of four weeks from today.

JUDGE